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No. 94-162

In the Supreme Court of the United States

OCTOBER TERM, 1994

ALBERTO A. ROSALES, SR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals' dismissal of a former fugitive's appeal was consistent with the standards set out in this Court's decision in *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993).

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OPINIONS BELOW

The opinion of the court of appeals on remand from this Court (Pet. Supp. App. 1-7) is reported at 13 F.3d 1461. The prior opinion of the court of appeals is unpublished, but the decision is noted at 978 F.2d 719 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 10, 1994. On May 12, 1994, Justice Kennedy granted an extension of time, to and including June 17, 1994, within which to file a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of engaging in a continuing criminal enterprise (CCE), in violation of 21 U.S.C. 848 (Count 1); two counts of conspiracy to import marijuana, in violation of 21 U.S.C. 963 (Counts 2, 4); one count of conspiracy to possess various controlled substances with intent to distribute them, in violation of 21 U.S.C. 846 (Count 6); two counts of importation and attempted importation of marijuana, in violation of 21 U.S.C. 952(a) (Counts 3, 5); and three counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Counts 7, 9, and 11). Gov't C.A. Br. 2.

Petitioner was sentenced to 45 years' imprisonment on the CCE count and to consecutive terms of five years' imprisonment on each of the eight remaining counts, for a total of 85 years' imprisonment. The court of appeals vacated petitioner's convictions and sentences on Counts 2, 4, and 6, and affirmed in all other respects. Petitioner filed a petition for a writ of certiorari, and this Court granted the petition and remanded the case (113 S. Ct. 2406 (1993)) to the court of appeals for further consideration in light of *Ortega-Rodriguez* v. *United States*, 113 S. Ct. 1199 (1993). On remand, the court of appeals dismissed petitioner's appeal. Pet. Supp. App. 1-7.

1. The evidence presented at trial is recounted in the government's initial brief in the court of appeals. Gov't C.A. Br. 4-25. Petitioner was the head of a drug ring that trafficked in heroin, cocaine, and marijuana from January 1982 to May 1985. In 1982, federal agents seized in transit several shipments of marijuana that members of petitioner's ring had attempted to smuggle into the United States from Jamaica and Colombia. In 1984, one

of petitioner's partners, David Quiles, quit the ring and began cooperating with the Drug Enforcement Agency (DEA). At the direction of DEA agents, Quiles arranged to purchase from petitioner and others one kilogram of heroin for $280,000, and in May 1985, these negotiations culminated in the delivery of the heroin.

2. Petitioner was arrested at the time of the heroin delivery and released on a $150,000 personal surety bond.[1] On March 23, 1987, petitioner's trial commenced. Thereafter, on April 16, 1987—the fourteenth day of trial—petitioner became a fugitive. Pet. Supp. App. 3. The district court proceeded with the trial in petitioner's absence and, on April 17, 1987, the jury found petitioner guilty on all counts. The district court ordered petitioner's bond forfeited and in August 1987 entered a $150,000 judgment against him.[2] *Ibid.*

On November 26, 1988, petitioner was apprehended after spending more than 19 months as a fugitive. In March 1989, the district court sentenced petitioner.[3] In April 1989, petitioner appealed his conviction and sentence and thereafter filed a motion in the district

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[1] The bond was secured by equity in petitioner's home, stock in his bakery, two automobiles, and a $30,000 corporate surety bond. Pet. Supp. App. 3 n.2.

[2] The district court's judgment "was to be satisfied by any and all of [petitioner's] real or personal property," Pet. Supp. App. 3 n.3, including his home, business, and two cars. In June 1988, foreclosure proceedings were completed on the home. Judgment was also entered against petitioner and the bonding company on the corporate surety bond. *Ibid.*

[3] The court of appeals' opinion erroneously states that petitioner was sentenced "approximately one year after his flight." Pet. Supp. App. 3. Reference to the specific dates involved shows that the sentencing in March 1989 occurred approximately two years after his April 1987 flight.

court to be declared indigent in order to have the government bear the costs of the trial transcript and his appeal. On June 13, 1989, the court of appeals dismissed petitioner's appeal for want of prosecution and for failure to file a docketing statement and to make financial arrangements with the court reporter. The next day, petitioner filed an affidavit of indigence with the district court in which he stated that he had no cash and owned no real or personal property of any value. Petitioner then filed a motion for reinstatement of his appeal. Pet. Supp. App. 3-4.

On June 20, 1989, the magistrate entered an order denying petitioner's motion to be declared indigent, and petitioner appealed that order to the district court. Thereafter, the court of appeals granted petitioner's motion to reinstate his appeal and stayed appellate proceedings until the district court ruled on petitioner's request for indigent status. On August 21, 1989, the district court denied petitioner's motion to be declared indigent, and petitioner appealed that order to the court of appeals. Treating the appeal as a motion for leave to proceed on appeal *in forma pauperis* under Fed. R. App. P. 24(a), the court of appeals granted petitioner his requested relief. Finally, approximately four and one-half years after his conviction, petitioner filed his brief in the court of appeals. Pet. Supp. App. 4.

3. The court of appeals held that petitioner had waived his right to challenge putative trial errors on appeal when he became a fugitive during trial. In so holding, the court relied on *United States* v. *London*, 723 F.2d 1538, cert. denied, 467 U.S. 1228 (1984), a case that established the Eleventh Circuit's rule that a defendant who

becomes a fugitive during trial waives his right to appeal. Pet. Supp. App. 4.[4]

This Court granted petitioner's petition for a writ of certiorari, and remanded the case (113 S. Ct. 2406 (1993)) for further consideration in light of its decision in *Ortega-Rodriguez* v. *United States*, *supra*. In *Ortega-Rodriguez*, the Court overturned the Eleventh Circuit's automatic dismissal rule, holding that "[a]bsent some connection between a defendant's fugitive status and his appeal," courts may not dismiss appeals filed by defendants who have been returned to custody before invoking their appellate rights. 113 S. Ct. at 1208. The Court indicated, however, that it was not holding "that a court of appeals is entirely without authority to dismiss an appeal because of fugitive status predating the appeal." *Ibid.*

4. On remand, the Eleventh Circuit again dismissed petitioner's appeal, relying on the rule it had fashioned on remand in *Ortega-Rodriguez*. That rule provides:

> [T]his Court should dismiss a former fugitive's appeal unless the defendant can show that: (1) granting the appeal is not likely to result in an undue burden on the government and; (2) the defendant's flight has not resulted in nor will not [*sic*] result in significant interference with the operation of the judicial process in either the district court or the appellate court.

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[4] The court of appeals did vacate petitioner's convictions on the three conspiracy counts—Counts 2, 4, and 6—on the grounds that those counts had merged with his conviction on the CCE count. Gov't Supp. C.A. Br. 5.

United States v. *Ortega-Rodriguez*, 13 F.3d 1474, 1476 (11th Cir. 1994); see Pet. Supp. App. 5. The court held that petitioner's case did not satisfy either requirement.

With respect to the burden on the government, the court of appeals noted that if petitioner were to prevail on any arguments other than a challenge to the sufficiency of the evidence, "the government would be required to gather evidence and witnesses from five years ago." Pet. Supp. App. 6 (footnote omitted).[5] Finding a direct causal connection between petitioner's flight and the extreme delay in this case, the court of appeals concluded that the government would be unduly burdened by permitting the appeal to proceed. *Ibid.*

The court of appeals further found that petitioner's flight, through the resulting forfeiture of his bond, had caused the lengthy collateral litigation involving petitioner's request to be declared indigent for costs on appeal.

> As a threshold matter, it is necessary to point out the causal connection between [petitioner's] flight and his financial situation. Had [petitioner] never become a fugitive, he would not have lost his home, business and cars which served as part of the security for his two bonds totaling $180,000. If he had not lost these possessions, he would have been able to pay for his trial transcript and the costs of his appeal.

Pet. Supp. App. 6. Based on that fact, the court of appeals concluded that petitioner's flight had "already signifi-

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[5] In assessing the burden on the government, the court of appeals focused strictly on the five-year delay caused by petitioner's flight. Pet. Supp. App. 6. In fact, however, by the date of the court of appeals' opinion, nearly seven years had elapsed since petitioner's conviction.

cantly interfered with the [judicial] process in both our Court and the district court sufficient to warrant the sanction of dismissal." *Id.* at 7. Because petitioner did not establish the prerequisites for maintaining his appeal, the court dismissed petitioner's appeal. *Ibid.*

ARGUMENT

1. Petitioner contends that the Eleventh Circuit's rule governing the dismissal of appeals by former fugitives is inconsistent with the standards set forth by this Court in *Ortega-Rodriguez*. That contention is without merit.

In *Ortega-Rodriguez*, the Court held that the courts of appeals may not automatically dismiss all appeals filed by former fugitives who have been returned to custody before invoking the appellate process. 113 S. Ct. at 1208-1209. The Court made clear, however, that the courts of appeals may exercise discretionary authority to dismiss such appeals when there is "some connection between a defendant's fugitive status and his appeal," so that dismissal is a reasonable response. *Id.* at 1208. Dismissal is inappropriate only when a defendant's "former fugitive status in no way affects the appellate process." *Id.* at 1209 n.23.

Contrary to petitioner's claim, the test applied by the court of appeals in this case fully comports with the holding in *Ortega-Rodriguez*. The first prong of the court's test inquires whether granting the appeal is "likely to result in an undue burden on the government." Pet. Supp. App. 5. That is an appropriate consideration. *Ortega-Rodriguez* expressly recognized that a long escape that prejudiced the government "in locating witnesses and presenting evidence at retrial" might "make dismissal an appropriate response." 113 S. Ct. at

1208.[6] In this case, the court found such an undue burden because, in the event of retrial, the prosecution would be required to gather evidence and witnesses from 1987, due to the five-year delay occasioned strictly by petitioner's flight. Pet. Supp. App. 6.[7]

Petitioner further argues (Pet. 7-8) that the Eleventh Circuit's test governing dismissals is flawed in that it allows consideration of significant interference with the operation of the judicial process "in either the district court or the appellate court." Pet. Supp. App. 5. According to petitioner, only appellate court operation can be considered under this Court's holding in *Ortega-Rodriguez*. Although under *Ortega-Rodriguez* a defendant's flight must have an impact on the "appellate process" to be properly considered in the dismissal determination, 113 S. Ct. at 1209, that "appellate process" may involve both the district court and the

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[6] We recognize that the burden on the government would be an inappropriate consideration if an appeal were premised solely on a challenge to the sufficiency of the evidence, since no retrial could be had if petitioner prevailed. *Ortega-Rodriguez*, 113 S. Ct. at 1208. In this case, however, although petitioner did raise sufficiency of the evidence claims with respect to certain counts, he also raised other claims of error which, if successful, would have necessitated a retrial. Moreover, as we discuss below, the court of appeals also relied on the fact that petitioner's flight interfered with the appellate process as an independent basis for dismissal.

[7] Petitioner suggests that the court's finding of a burden was erroneous because one prosecution witness specifically identified in the opinion below died in 1987, and thus would not have been available even in the event of a prompt retrial. Pet. 11-12. The court of appeals' conclusion that the government would be unduly burdened on retrial, however, was based on a general assessment of the difficulties in "gather[ing] evidence and witnesses" after the passage of so much time, not just on the loss of one witness's testimony. Pet. Supp. App. 6.

appellate court. In this case, for example, the extensive collateral litigation concerning petitioner's request to be declared indigent for purposes of appeal took place after petitioner filed his notice of appeal and delayed and complicated the appeal. The collateral proceedings were therefore connected to the "appellate process," although they were conducted in both the district court and the court of appeals. See Pet. Supp. App. 3-4.

Accordingly, the Eleventh Circuit's finding that petitioner's flight had "already significantly interfered with the [judicial] process in both our Court and the district court sufficient to warrant the sanction of dismissal," Pet. Supp. App. 7, is an appropriate consideration under *Ortega-Rodriguez*. There is no indication that the Eleventh Circuit would apply its current test in a manner that conflicts with this Court's decision in *Ortega-Rodriguez*, *i.e.*, that it would allow dismissal of an appeal based solely on the fact that a defendant's flight had interfered with the pre-appeal judicial process in the district court.

2. There is no merit to petitioner's further contention (Pet. 9-11) that the decision below conflicts with decisions of the District of Columbia Circuit and the Ninth Circuit. This Court in *Ortega-Rodriguez* specifically held that the circuits need not adopt a uniform approach to the dismissal of appeals brought by former fugitives. 113 S. Ct. at 1209 n.24. Rather, "so long as all circuit rules meet the threshold reasonableness requirement, in that they mandate dismissal only when fugitivity has some connection to the appellate process, they may vary considerably in their operation." *Ibid.*

In any event, the cases petitioner cites reveal no conflict among the circuits. In *United States* v. *Reese*, 993 F.2d 254, 256 (D.C. Cir. 1993), and *United States* v. *Sudthisa-Ard*, 17 F.3d 1205, 1207 (9th Cir. 1994), the

courts of appeals dismissed the appeals of former fugitives on the ground that presentencing flight interfered with the appellate process by preventing consolidation of a defendant's appeal with that of his co-defendant. In neither *Reese* nor *Sudthisa-Ard*, however, did the court of appeals suggest that prevention of consolidation was the *only* appropriate basis for a finding of interference with the appellate process; accordingly, neither the District of Columbia Circuit nor the Ninth Circuit has "declined to follow the Eleventh Circuit's new rule," as petitioner claims. Pet. 9.[8]

3. Petitioner's final claim (Pet. 12-13) is that it was improper for the court of appeals to consider the delay caused by the litigation of his motion to be declared indigent for costs on appeal in assessing whether petitioner's flight had interfered with the appellate

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[8] Petitioner also relies on the Ninth Circuit's unpublished memorandum decision in *United States* v. *Hearron*, No. 86-1232 (Jan. 18, 1994), although Ninth Circuit Rule 36-3 provides that such dispositions are not precedential and should not be cited except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel. Moreover, *Hearron* is distinguishable because it involved a defendant who absconded while his appeal was pending and was subsequently recaptured. See *Ortega-Rodriguez*, 113 S. Ct. at 1205 (cases involving fugitives during appeal present different considerations than fugitives returned to custody before appeal). Relying on its prior opinion in *Katz* v. *United States*, 920 F.2d 610 (1990), the Ninth Circuit decided to reinstate Hearron's appeal, which was clearly meritorious in light of the court's earlier reversal of his co-defendant's conviction. In *Sudthisa-Ard*, however, decided after *Hearron*, the Ninth Circuit emphasized that "*Katz* permits, but does not require, review of a recaptured defendant's appeal." 17 F.3d at 1208. Accordingly, there is no conflict between the Ninth Circuit's practice and the Eleventh Circuit's rule.

process.[9] He asserts that he might have lost his property by means other than bond forfeiture, such as through asset forfeiture had he engaged in cocaine trafficking on the premises. Since selling cocaine would not result in dismissal of his appeal, petitioner reasons that the sanction of dismissal should not attach to the less serious offense of becoming a fugitive. Petitioner's claim is foreclosed by the Court's recognition in *Ortega-Rodriguez* that appellate courts may dismiss appeals of defendants whose flight is deemed a significant interference with the appellate process, 113 S. Ct. at 1208-1209, even though the commission of other presumably more serious crimes would not result in that sanction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[9] Although petitioner suggests that his claimed indigence was not in fact caused by his flight (Pet. 13 n.7), he does not appear to be seeking review of the court of appeals' contrary finding. In any event, that factual determination does not warrant review by this Court.